FILED
FEB 9 1935
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

WALTER T. COLQUITT,
COLQUITT, PARKER, TROUTMAN & ARKWRIGHT,
Attorneys for Appellants.

SUBJECT INDEX

	Pages
List of cases, text books and statutes cited in brief	
Reference to opinion delivered by the Supreme Court of the State of Georgia set out in the record	1
Reference to statement of the grounds on which the jurisdiction of this Court is invoked	1
Statement of case	2
Appellants Contentions and Pleadings	3
Specification of Assigned Errors	8
Argument and Citation of Authorities	18
Constitutionality of the Statutes of Georgia: Ga. Laws 1919, Page 934 et seq, and Ga. Laws 1924, Page 534 et seq	19
Constitutionality of Assessment Statutes Not Decided in Previous Cases	30
State Court Erred in Holding that Appellants Had Failed to Overcome Presumption of Benefits in View of Ruling That Exclusion of Evidence on That Question Proper	32
Exclusion of Appellants' Evidence Showing Absence of Benefits Constituted Denial of Due Process of Law	34
State Court's Holding That Merger of Companies Resulted in Merger of Franchises Erroneous and Inconsistent	35
Improvement Assessment Invalid as Blanket Lien on Appellants' Property "Wherever Located"	36
Statutes and Assessment not Within Classification of General Taxation	36

ALPHABETICAL LIST OF CASES AND AUTHORITIES CITED IN BRIEF

Pages

Asbary v. Roanoke, 91 Va. 562; 42 L. R. A. 636.... 23

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8,19.....2, 26, 30, 34

Barber v. Southern Constr. Co., 20 Ky. L. Rep. 796; 47 S. W. 608..... 24

Blair v. Chicago, 201 U. S. 400..... 34

Bonds v. Brown, 133 Ga. 451 (2)..... 37

Brumby v. Harris, 107 Ga. 257, 258–259..... 23

Carolina & N. W. Ry. Co. v. Town of Clover, S. C.; 46 Fed. (2d) 395..... 26, 29

City of Barree v. Barree Chelsa Rwy. Co., 123 Atl. 427..... 25

City of Brunswick v. Gordon Realty Co., 163 Ga. 536, 641, 642..... 22

City of Brookline v. Natwick, 22 S. D. 322, 117 N. W. 376..... 23

City of Commerce v. Southern Ry. Co., 35 Fed. (2d) 331.....25, 26, 29

City of San Diego v. Atkinson, Topeka & Santa Fe Ry. Co., 45 Fed. (2d) 11..... 26

Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116.. 34

Colson v. Meyers, 80 Ga. 499 (1)..... 37

Detroit U. R. Co. v. Detroit, 229 U. S. 39..... 34

Fountain v. Hagan Gas Engine & Mfg. Co., 140 Ga. 70 (2)..... 37

	Pages
Gage v. Chicago, 225 Ill. 218; 80 N. E. 128	23
Georgia Rwy. & Banking Co. v. Town of Decatur, 137 Ga. 537, 540	22
Georgia Rwy. & Power Co. v. Town of Decatur, 152 Ga. 143; 153 Ga. 329; 262 U. S. 432	13, 31, 32, 35
Georgia Power Co. v. City of Decatur, 168 Ga. 705	13, 31
Georgia Power Co. v. City of Decatur, 74 U. S. L. Ed. 999, 281 U. S. 505	13
Georgia Power Co. v. Decatur, 170 Ga. 699	31
Georgia Power Co. v. City of Decatur, 173 Ga. 219	31
Hayden v. City of Atlanta, 70 Ga. 817, 834	23
Heman Construction Co. v. Levy, 179 Mo. 455, 78 S. W. 613	24
Holley v. Peace, 110 N. C. 32; 17 L. R. A. 330	24
Holst v. City of La Grange, 175 Ga. 402, 404	23, 28
Hoover v. People, 171 Ill. 182; 49 N. E. 367	23
Mayor & Alderman of Savannah v. Knight, 172 Ga. 371, 374–375	23
Meyer v. Covington, 103 Ky. 546; 45 S. W. 769	24
Neenan v. Smith, 50 Mo. 525, overruling former Missouri case of St. Louis v. Grubbs, 80 Mo. App. 433	24
Norwood v. Baker, 172 U. S. 269	25, 26, 29, 37
Page v. W. W. Case Co., 145 Cal. 578; 79 Pac. 278	24
Road Improvement Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188	25, 26, 27, 29
Road Improvement Dist. No. 1 of Franklin Co. Ark. v. Missouri Pac. R. Co., 2 Fed. (2d) 340, 341	25, 26, 29

Pages

Sanders v. Shaw, 244 U. S. 317 ..... 2, 26, 34

Sneider v. Massachusetts, 291 U. S. 97, 128 ..... 2, 26, 34

Standard Pipe Line Co. v. Miller County Hwy. Dist., 277 U. S. 160, 162 ..... 25, 26, 29

Taylor v. Palmer, 31 Cal. 241 24

United Railways & Elec. Co. v. Mayor of Baltimore, 127 Md. 660; 96 Atl. 880 ..... 22, 25

Virginia v. Hall, 96 Ill. 278 23

Webb v. Thompson, 146 Ga. 461 37

Woodward v. Collett, 20 Ky. L. Rep. 1006; 48 S. W. 164 24

CONSTITUTION OF THE STATE OF GEORGIA, STATUTES AND TEXT BOOKS CITED

Constitution of the State of Georgia, Article VII, Section 2, Paragraph 1, (Ga. Code Section 6553) 3, 9, 22, 37

Georgia Laws 1919, Pages 934 et seq 3, 4, 9, 12, 19

Georgia Laws 1924, Pages 534 et seq 3, 4, 9, 12, 19

Elloitt on Roads & Streets, 3rd Edition, Vol. 2, Section 707 24

44 Corpus Juris, "Municipal Corporations," Page 877, Section 3[illegible]6 and cases collected and cited in Note 81 24

44 Corpus Juris, "Municipal Corporations," Page 25, Section 2896 25

Cooley "Taxation," 4th Ed., Vol. 1, Section 97 36

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,
Appellants,

vs.

CITY OF DECATUR,
Appellee

No. 570
October Term, 1934.
Supreme Court of the United States.

BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY

I.

OPINION AS DELIVERED IN THE COURT BELOW

As yet the opinion delivered in the case at bar by the Supreme Court of the State of Georgia has not been reported in the official Georgia Reports.

The opinion brought to this Court for review is found in the printed transcript of the record, pages 126-147.

II.

FEDERAL QUESTIONS INVOLVED SHOWING THE JURISDICTION OF THIS COURT

In accordance with Paragraph 1 of Rule 12 there has heretofore been compiled and filed with this Court a concise statement of the grounds on which the jurisdiction of this Court is invoked. In addition to what is therein stated

the jurisdiction and decision of this Court is invoked upon the following additional Federal questions:

The Supreme Court of the State of Georgia sustained and upheld the rulings of the trial court denying appellants the right and opportunity to present evidence showing that appellants' property received no benefits from the improvement in question. This was a denial of the due process of law provision and the equal protection of law clause of the 14th Amendment to the Constitution of the United States.

Sanders v. Shaw, 244 U. S. 317;

Sneider v. Massachusetts, 291 U. S. 97, 128.

A Federal question is raised and involved in that the construction placed upon said statutes in question made the legislative presumption of benefits conclusive and deprived appellants of the right to establish by evidence an entire lack of benefits, and, as thus construed and enforced against appellants, denied them the equal protection of law and the due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 19.

III.

STATEMENT OF CASE

The City of Decatur (a Municipal corporation of the State of Georgia, DeKalb County) brought a suit in the Superior Court of Fulton County, Georgia to recover a personal and general money judgment for $13,444.66 and interest, from June 21st, 1926, against each of appellants by virtue of a special paving assessment for street improvement.

(Printed record, pages 5–19.)

The said improvement assessment was made under and by virtue of legislative acts of the State of Georgia, giving

the City of Decatur the right or power to improve and re-improve its streets "and to make assessments against the abutting real estate and against any street railway or other railroad company and the property thereof having a car track or car tracks running along or across said streets, lanes, squares or public places for the cost of such improvements." (Ga. Laws 1919, pp. 934 et seq., and Ga. Laws 1924, pp. 534, et seq.)

Appellants Contentions and Pleadings

Appellants by demurrer and motion to dismiss the petition, and by answer, pleaded:

Under said legislative acts the City of Decatur was not entitled to a personal and general money judgment against appellants or a blanket lien against all of appellants' property, both real and personal.

In Georgia, all special improvement assessments are an exercise of the taxing power. By virtue of the Georgia constitutional provisions (Ga. Code Section 6553), requiring taxation to be uniform and ad valorem on all property and levied under general laws, all special improvement assessments are and must be based upon special benefits to the particular property assessed, produced by the improvement.

Special assessments are based upon real property and not upon personal property; are confined to the real property specially benefited, and are not general and personal obligations of the property owner. Executions therefor do not run generally against the property owner, nor against the property of the owner not situated upon the street improved, and are enforceable only against the property specially benefited.

(Demurrer, printed record pages 38-41. Answer, printed record pages 20-37.)

It was specifically pleaded that neither appellants nor appellants' property received any benefit from the improvement in question.

(Printed record, pages 28, 29, 30, 33, 34.)

Appellants specially pleaded that if the legislative Acts of the State of Georgia (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.) and the Municipal assessment ordinances passed thereunder be so construed as to create a blanket lien against all of appellants' property (both real and personal), and a personal and general liability upon appellants, then, under the facts pleaded in the case at bar, said Acts and Ordinances as thus construed would be illegal, void and unconstitutional; in contravention of the equal protection clause, and the due process of law provision of the 14th Amendment to the Constitution of the United States.

It was specifically pleaded that such construction of said Acts and assessment ordinances would unconstitutionally discriminate against appellants; would unconstitutionally confiscate their property, and unconstitutionally deprive them of the equal protection of law and the due process of law guaranteed by the 14th Amendment of the Constitution of the United States.

Appellants attacked said Acts, as thus construed, as being unconstitutional and in violation of the equal protection clause and due process provision of the 14th Amendment of the Constitution of the United States, for that:

(a) As against all other property owners, special improvement assessments must be based upon special benefits accruing to the particular property affected thereby; whereas, as against street railway companies (appellants), neither the street railway company nor the street railway company's property received any special benefit from the improvement in question. (Appellants specifically pleaded that neither appellants nor appellants' property received any benefits from

the improvement in question and were denied the right to establish such fact by evidence.)

(b) As against all other parties, improvement assessments are in rem and not in personam and are enforceable solely against the property specially benefited; whereas, as against appellants, the improvement assessment is in personam and a blanket lien against all of appellants' property, both real and personal, and is not confined to particular property benefited.

(c) As against all other parties, such assessments cannot exceed the special benefits accruing to particular property specially benefited; whereas, as against appellants, the assessment exceeds all special benefits to any and all property and to the property owner.

(d) As against all other parties, improvement assessments are based upon and confined to the real property alone; whereas, as against appellants, the assessment is not confined to real property but is based upon personal as well as real property.

(e) As against all other parties such assessments, being confined to real property, can not be enforced against personalty; whereas, as against appellants, such assessments are not to be confined to real property but can be based upon and enforced against personal property.

(Demurrer, printed record pages 39–41. Answer, printed record pages 29, 31, 33.)

In the trial of the case, appellants objected to evidence showing the value of personal property of appellants, the objection being—"Personal property could not be made the basis of any special paving assessment and to allow personal property of the company and the value of personal property to be considered in a paving assessment or in arriving at a paving assessment would deprive appellants and each of them of the equal protection of the law as guaran-

teed to them by the 14th Amendment to the Constitution of the United States, for that, with reference to all other persons and all other special paving assessments, personal property and the value thereof, was not considered as a basis for paving assessments or in arriving at the amount of paving assessments." Said objection was overruled and the evidence admitted.

(Printed record, pages 80–81.)

Against all other parties (than appellants) the legislative presumption of benefits is rebutted and a prima facie case of confiscation is established by evidence that the entire value of the particular property specially benefited, will be required to pay the assessment; whereas, as against street railway companies (appellants) said legislative presumption of benefits is and can not thus be rebutted.

In the case at bar, appellants specially pleaded that its entire street railway property and franchises in the municipal limits of Decatur were not of sufficient value to pay the assessment in question. As evidentiary of this fact, appellants offered and tendered all of its railway property and franchises located within the municipality.

(Printed record, pages 99–104.)

The court refused appellants the right to introduce evidence and testimony to establish said facts.

(Printed record, pages 99–107.)

As against all other parties than appellants, evidence showing the entire absence of benefits, conclusively rebuts the legislative presumption of benefits and establishes unconstitutional confiscation of property; whereas, in the case at bar, as against street railway companies, (appellants), the court in effect holds that the legislative presumption of benefits and confiscation can not thus be rebutted, and that legislative presumption of benefits is conclusive and not rebuttable.

The court held that all of the documentary and oral evidence offered and tendered by appellants, establishing the fact that appellants and appellants' property had received no benefits whatever from the paving improvement in question, was inadmissible.

(Printed record, pages 105–107.)

The Supreme Court of the State of Georgia held that if such evidence had been admitted, (although uncontradicted), it "would not have changed the status of the case but would have been immaterial to its consideration."

(Printed record, pages 146–147.)

In the trial of the instant case, the lower or trial court construed the legislative acts in question as precluding appellants from any right to show the lack of benefits and excluded all of the evidence and testimony tendered and offered by appellants establishing the entire absence of benefits from the improvement in question.

(Printed record, pages 99–107.)

The trial court directed a personal and general money judgment against appellants for the amount sued for and gave plaintiff in the court below (appellee) a lien by general judgment for said improvement assessment upon any property of defendants (appellants) *wherever located*.

(See printed record pp. 124–126.)

Appellants contended that said improvement acts as thus construed and enforced against appellants, the exclusion of all evidence offered by appellants, followed by the direction of a verdict and decree giving appellee a personal and general judgment against appellants and a lien by general judgment for said improvement assessment on any property of appellants *wherever located*, was a denial of the due process of law and the equal protection provision of the 14th Amendment to the Constitution of the United States.

The different and various rulings of the trial court, the overruling of the demurrer, the rejection of all evidence offered by appellants, the direction of the verdict and the decree entered thereon and all the Federal questions attacking the constitutionality of the improvement statute and the special assessment in question, as construed and enforced against appellants, were duly carried to the Supreme Court of the State of Georgia.

The Supreme Court of the State of Georgia (the highest court of this State in which a decision could be had) upheld the constitutionality of the said improvement acts, as construed and enforced against appellants, and upheld the improvement assessment in question and held that under said improvement statutes appellee was entitled to a personal and general judgment and that from the time of the ordinance making the assessment the appellee had a general lien for said improvement assessment "on any property of the appellants *wherever located*."

(Printed record p. 125 and 126.)

IV.

SPECIFICATION OF THE ASSIGNED ERRORS UPON WHICH A DECISION OF THIS COURT IS INVOKED

Appellants respectfully request a consideration and determination of each and all of the assignments of error made in the case at bar.

These assignments of error are set out on pages 151-159 of the printed transcript of the record and are as follows:

1. The Supreme Court of the State of Georgia (the highest Court of said State) erred in holding that the legislative acts of the State of Georgia, giving the City of Decatur the right to improve and reimprove its streets and make assessments for such improvements and reimprovements against

street railway companies (Ga. Laws 1919, pp. 934, et. seq. and Ga. Laws 1924, pp. 534 et. seq.), amending and adding to the charter powers of the City of Decatur, and giving it the right to improve and reimprove its streets and make assessments against street railway companies and the property thereof, were valid, legal and constitutional acts.

In said suit there was drawn in question the validity and constitutionality of said acts and statutes of the State of Georgia on the ground that they were repugnant to the equal protection and the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States, and on the ground that they, as construed and enforced by the State Court, confiscated appellants' property in violation of the Fourteenth Amendment to the Constitution of the United States. The decision of the Supreme Court of the State of Georgia was in favor of the validity of said statutes, which decision is hereby assigned as error.

2. In said suit there was drawn in question the validity and constitutionality of the said statutes of the State of Georgia (Ga. Laws 1919, pp. 934 et. seq. and Ga. Laws 1924, pp. 534 et. seq.) on the ground that said statutes were repugnant to the Fourteenth Amendment of the Constitution of the United States in that they denied to appellants and each of them the equal protection of the law and the due process of law as therein guaranteed, and confiscated the property of appellants in contravention of said Federal Constitutional Amendment. The decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes, which decision is hereby assigned as error.

In Georgia, by virtue of the provisions of the State Constitution, requiring uniformity of taxation, as embodied in Civil Code of Georgia, 1910, Section 6553, the Supreme Court of Georgia holds that all improvement assessments and the statutes under which they are levied must be based upon

and are sustained only to the extent that special benefits accrue to the particular property affected.

Appellants say that the aforesaid special improvement statutes of the State of Georgia, as construed and enforced by the Supreme Court of Georgia, against appellants in the case at bar, denied to appellants the equal protection of the law and the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and resulted in the confiscation of appellants' property in contravention of said constitutional provisions, upon each of the following grounds:

(a) As against all other parties (owners of property), the assessments made under said legislative acts must be based upon special benefits accruing to the particular property affected thereby. As against street railway companies and appellants in the instant suit, the paving assessment need not be based upon special benefits accruing to particular property affected thereby.

(b) Under said legislative acts as construed and enforced against all other parties, improvement assessments (and executions therefor) are in rem and not in personam and are enforceable solely against the particular property specially benefited. As against street railway companies and appellants, the improvement assessment (and executions therefor) are in personam—a blanket lien against the street railway companies and appellants and also against all of their properties—and are not confined to particular property benefited.

(c) As against all other parties, such assessments cannot exceed the special benefits accruing to the particular property specially benefited thereby, but as against street railway companies and appellants, such assessments can exceed not only the special benefits resulting to the particular property affected thereby, but also all special benefits whatever resulting to the property owner.

(d) As against all other parties, such assessments are

confined to the real property specially benefited and cannot be based upon general benefits to other property, but as against street railway companies and appellants, said assessments are not confined to real property specially benefited but can be and are based upon all property of any kind or character.

(e) As against all other parties, such assessments are confined to real property and cannot be enforced against personal as well as real property, but as against street railway companies and appellants, such assessments are not to be confined to real property but can be based upon personal property, as well.

(f) As against all other parties, the legislative presumption of benefits in the case of assessments levied under said statutes and the municipal ordinances enacted thereunder are rebutted and a prima facie case of confiscation is established by proof that the entire value of the particular property specially benefited is required to pay the assessment, but as against street railway companies and appellants, the said presumption of benefits is not rebutted and a prima facie case of confiscation is not established by such proof.

(g) As against all other parties, evidence showing the entire absence of special benefits conclusively rebuts the legislative presumption of benefits as embodied in said statutes and the municipal ordinances enacted thereunder, and establishes unconstitutional confiscation of property; but as against street railway companies and appellants, the legislative presumption of benefits are conclusive and not rebuttable, the Georgia Supreme Court, in passing upon the question of benefits from local improvements in the case at bar, holding that documentary and oral evidence and testimony offered by appellants showing and proving that appellants and appellants' property had received no benefits whatever from the paving improvement in question was irrelevant and immaterial, and that such evidence, if admitted (although

uncontradicted), "would not have changed the status of the case but would have been immaterial to its consideration."

3. The Supreme Court of the State of Georgia erred in holding that the demurrers (or motions to dismiss the petition) filed by appellants to the petition brought by the City of Decatur against appellants were properly overruled.

(a) In said demurrers there was drawn in question the validity and constitutionality of the said statutes of the State of Georgia, (Ga. Laws 1919, pp. 934 et. seq. and Ga. Laws 1924, pp. 534 et. seq.) on the ground that they were repugnant to the Fourteenth Amendment to the Constitution of the United States, in that they denied to appellants the equal protection of the law and the due process of law therein guaranteed and in that the construction and enforcement of said statutes under said decision confiscated appellants' property in contravention of said constitutional provisions. The judgment overruling the demurrers filed by appellants was in favor of the validity and constitutionality of said statutes, which decision is hereby assigned as error.

(b) In passing upon said demurrers the Supreme Court of the State of Georgia construed and enforced said statutes as making said legislative enactment and municipal ordinances passed thereunder absolutely conclusive against street railway companies and appellants on the question of benefits from the improvement or reimprovement of streets; and denied to street railway companies and appellants any judicial hearing, trial or adjudication with reference to the question of benefits resulting from street improvements made under said statutes.

4. The Supreme Court of the State of Georgia erred in holding that the trial court properly excluded any and all testimony and evidence offered and tendered by appellants which would show or establish the fact that appellants and appellants' property had received no benefits from the street paving improvement in question: and erred in holding that

if said evidence "excluded over objection had been admitted, the same would not have changed the status of the case but would have been immaterial to its consideration."

Said decision of the Supreme Court of Georgia was erroneous in that it denied appellants the right to introduce evidence showing and establishing an entire absence of benefits from the street improvement in question, and denied to them any judicial investigation or determination of the question of benefits or the entire absence of benefits, and thus denied appellants the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Georgia erred in holding: "The question of no benefit, that the paving assessment was confiscatory, the offer to surrender, and abandon the property—in fact, the questions now raised on the legality of the assessment—were made in that case and in the case of Georgia Railway and Power Company v. Decatur, 152 Ga. 143; 262 U. S. 432, and were decided adversely to the contention of the railway companies. (Georgia Railway and Power Company v. City of Decatur, 168 Ga. 705.) The Supreme Court of the United States, on review of this case, affirmed it. (Georgia Power Company v. City of Decatur, 74 U. S. Law Edition 999, 281 U. S. 505). So it may be easily seen that in the well beaten paths of the plaintiff in error to the courts the questions they now make have been decided against them," which decision is hereby assigned as error upon the following grounds:

(a) In said cases there was not drawn in question the validity and constitutionality of the improvement assessment statutes in question. (Ga. Laws 1919, pp. 934 et. seq. and Ga. Laws 1924, pp. 534 et. seq.), and the court in said decisions did not decide or pass upon "the questions now raised on the legality of the assessment." In no previous decisions have the courts rendered any binding decision with reference

to the constitutionality of said statutes nor of the improvement assessment made thereunder.

(b) The Supreme Court of the State of Georgia misinterpreted the decisions heretofore rendered by the Supreme Court of the United States in former cases between appellants and appellee. In none of said cases have the legality and constitutionality of the Acts in question or the improvement assessment in question (as construed and enforced by the Supreme Court of Georgia) been drawn in question nor passed upon by the Supreme Court of the United States.

6. The Supreme Court of the State of Georgia erred in holding that appellants "did not show that the street railway franchise and property thereunder was the whole franchise and property held and operated by appellants in connection with their street railway and power business in the city; that they failed to show that they were not also operating in connection with the street railway business and electric light and power business in the city and that such franchise and property was not acquired by the Georgia Power Company in the merger."

Said decision is assigned as error on the following grounds:

(a) The Supreme Court of the State of Georgia held that the municipal franchise ordinance, under and by virtue of which the street railway lines in Decatur were constructed and being operated, offered in evidence by appellants, was properly excluded as being irrelevant and immaterial evidence. Said franchise (Exhibit 10 of the motion for new trial, record page..); if admitted in evidence, would have established the fact that street railway lines were constructed and being operated in the City of Decatur separately and independently from any and all electric light and power business.

(b) In a suit between appellants and the appellee, the appellee had established that the said municipal franchise, under and by virtue of which the street railway lines in the

City of Decatur were constructed and being operated, was distinct and separate, and a distinct classification from other franchises and from the electric business and electric property subsequently acquired.

(c) Separate and distinct municipal franchises and separate and distinct business and classification of business did not become one franchise and one business either by a conveyance of them into one company or by the merger of or consolidation of various companies into another company.

7. Because the Supreme Court of Georgia erred in holding, "If * * * * all of the evidence included over objection had been admitted, the same would not have changed the status of the case but would have been immaterial to its consideration." Said decision is hereby assigned as error upon the following grounds:

(a) It denies appellants the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States in that it deprived appellants of the right to have a judicial consideration and determination upon the evidence offered by it to prove and which, if admitted, would have proved and established an entire absence of benefits to appellants and appellants' property from the improvement for which the assessment in question was held to be a general personal obligation of appellants and a blanket lien against appellants and all of appellants' property from the time of the ordinance making the assessment.

(b) It excluded from consideration the municipal franchise under and by virtue of which the street railway lines in the City of Decatur were constructed and being operated, which franchise (set out in Ground 10 of the amended motion for new trial, record page No. . .), showed that the street railway lines and property in Decatur were distinct and separate from the power property and electric power business of appellants.

8. Because the Supreme Court of Georgia erred in hold-

ing: "The City authorities in causing the paving and making the assessment may very well have considered in determining the benefits to be derived therefrom, the value of the whole property and not merely the value of one branch of the service. Under the consolidation agreement wherein the Georgia Railway & Electric Company and the Georgia Railway & Power Company merged into the Georgia Power Company, all franchises originally granted the separate companies were consolidated and merged into one franchise * * *," which decision is assigned as error upon the following grounds:

(a) The mere consolidation of several companies into one company does not consolidate all of the various, separate and distinct franchises granted to each separate and distinct company "into one franchise;" and does not make the separate and distinct business of distributing electrical energy and power to the public one and the same business as that of furnishing street railway passenger service, and does not justify a consideration of all of appellants' property, personal or otherwise, wherever situated or possessed, as a basis of the improvement assessment in question. Said decision of the Supreme Court of the State of Georgia was unreasonable, discriminatory and an arbitrary exaction, depriving appellants of the equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States and results in an unconstitutional confiscation of appellants' property, for that said decision makes all of appellants' property, personal as well as real, and irrespective of where situated or possessed, the basis of the said improvement assessment; although as to all parties other than appellants and street railway companies such assessments are based only on special benefits accruing to the particular real estate specially affected and benefited by the improvement for which they are levied.

9. The Supreme Court of the State of Georgia, having held, under the consolidation agreement of 1927, whereby

the Georgia Railway & Electric Company and Georgia Railway & Power Company were merged into the Georgia Power Company under a charter granted by the Secretary of the State of Georgia, under Section 2607 of the Civil Code of Georgia that,—"all franchises originally granted separate companies were consolidated and merged into one franchise," erred in thereafter holding in said decision that the five-cent rate of fare franchise between one of said appellants and the City of Decatur was "still in force" and that losses attributable thereto were "immaterial" to the determination of the validity and constitutionality of said legislative acts and the improvement assessments made thereunder "while the rate contract continues." Said holding of the State court was violative of the Fourteenth Amendment of the Constitution of the United States for that it resulted in confiscation of appellants' property and deprived them of their property without due process of law and the said holding is assigned as error upon the following grounds, to wit:

(a) The merger of all franchises into one franchise by virtue of a consolidation, as held by said court, terminated the separate and several franchises of the consolidated companies; and it was unreasonable, arbitrary and discriminatory for said Court to hold that all franchises were merged into one, for the purpose of justifying its consideration of all of the appellants' property, real or personal, street railway or electrical, and wherever situated or possessed, on the question of whether benefits resulted to appellants from the improvement in question, and to thereafter hold that said franchises were not merged into one and that the five-cent fare franchise continued in force, so as to sustain the refusal of the trial court to allow appellants to show a total absence of benefits accruing to their property as a consequence of the improvement in question.

(b) The merger of all franchises into one franchise by virtue of a consolidation, as held by said Court, terminated

the separate and several franchises of the consolidated companies; and it was error for the Court, after so holding, to thereafter hold that the five-cent rate of fare franchise continued in force as a separate and distinct franchise so as to render the proof of losses thereunder immaterial on the question of special benefits, (made the sole basis for sustaining the improvement assessment in question), and so as to place said named franchise in a separate classification from all other franchises of appellants for the purpose, in effect, of denying jurisdiction to the Public Service Commission of the State of Georgia over said five-cent rate of fare franchise.

V.

ARGUMENT AND CITATION OF AUTHORITIES RELIED UPON

For the purpose of argument, the first, second, third and fourth assignments of error will be considered jointly inasmuch as each of these assignments relates to the validity and constitutionality of the legislative acts of the State of Georgia giving to the City of Decatur, the appellee, the right to improve and reimprove its streets and make assessments therefor against street railway companies. While each of these assignments involves a separate and distinct basis of attack upon the acts in question, they are all concerned with the constitutionality of the acts, as construed by the Supreme Court of Georgia, and whether, as thus construed, they denied to the appellants the equal protection of the law and the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and resulted in confiscation of appellants' property in contravention thereof.

(See pages 8–13 of this Brief and printed record, pages 151 to 155.)

1. Question of the Constitutionality of the Statutes of Georgia: Georgia Laws 1919, Page 934 et seq., And Georgia Laws 1924, Page 534 et seq.

This Court is asked to pass upon the constitutionality of the Acts of the Georgia Legislature (Ga. Laws 1919, pp. 934 et seq. and Ga. Laws 1924, pp. 534 et seq.), as construed and enforced against appellants. Said acts are amendments to the municipal charter of the City of Decatur, both Acts being substantially the same.

The pertinent part of said Acts provides that the City of Decatur, in the County of DeKalb, "shall have full power and authority, in their discretion, as hereinafter prescribed, to grade, regrade, pave, repave, build, rebuild and otherwise improve or reimprove any of the streets, alleys, lanes, squares or public places of said City now laid out and constructed. In order to make effective the power and authority above given and to provide funds therefor, said commissioners shall have full power and authority to assess the actual cost of such improvements above provided on the real estate abutting on any street, alley, lane, square or public place where improved, one-half (½) of the cost of such improvement shall be assessed against the real estate abutting on one side of the street, alley, lane, square or public place where improved, and one-half (½) of the cost of such improvement shall be assessed against the real estate abutting on the other side of such street, alley, lane, square or public place where improved; and any street railroad company or other railroad company having a track or tracks running along or across the streets, alleys, lanes, squares or public places of said city where so improved shall be required to pay the actual cost in full of grading, regrading, paving, repaving, building, rebuilding and otherwise improving or reimproving such street, alley, lane, square or public place between their tracks and for two (2) feet on each side thereof and in such cases and on such streets,

alleys, lanes, squares or public places where such assessments are made against such street railroad company or other railroad company, the remaining cost of such improvement shall be assessed against the real estate abutting on the street, alley, lane, square or public place where so improved, one-half (½) of such cost shall be assessed against the real estate abutting on one side of such street, alley, lane, square or public place where so improved, and the other one-half (½) of said cost shall be assessed against the real estate abutting on the other side thereof; provided that no grading, regrading, paving, repaving, building, rebuilding, or otherwise improving or reimproving any street, alley, lane, square or public place in said city and no assessments made, under the authority, power and provisions of this section shall be made unless provided for by ordinance, such ordinance to provide for doing the work, and notice of the introduction of which shall be published in some newspaper of said city, and if there is no newspaper published therein, then in some newspaper having a general circulation in said city, one time at least ten (10) days before the adoption of said ordinance, so that any person interested in said improvement may file his objection thereto with the city clerk and be heard by the commissioners. Said notice shall contain a statement of the street, alley, lane, square or public place to be improved or the part to be improved and the kind of improvements to be made, the date of the meeting of the commissioners at which said ordinance will be considered for adoption, and the same may be adopted at said meeting or some subsequent meeting, in the discretion of the commissioners, after such notice has been given. The amount of the assessment on each piece of real estate abutting on the street, alley, lane, square or public place where such improvements have been made shall be a lien on the real estate, such lien dating from the time of the passage of the ordinance making the assessment; and the amount of the assessment for such improvement against said street railroad company or other railroad com-

pany and against the property thereof shall be a lien against such railroad company and against the property thereof, dating from the time of the passage of the ordinance making the assessment. The said ordinance making the assessment against the abutting real estate and against such railroad company and the property thereof shall be made by the commissioners of said city after the completion of such improvements and when the cost thereof shall have been determined; and when the commissioners of said city have levied and assessed the cost of such improvement against the abutting real estate and against such street railroad company or other railroad company and against the property thereof, as above provided, they shall have full power and authority to enforce the collection of the amount of any such assessment so made for such improvement, by execution to be issued by the clerk of said city, against said abutting real estate and the owner thereof at the time of making the assessment and in accordance with such assessments, when the same is against such real estate; and against said street railroad company or other railroad company and against the property thereof when the same is against such railroad company and such property. Such executions shall be levied by the marshal of said city and after advertising and other proceedings, as in the case of sale of realty for city taxes, such property so levied upon, whether the same be abutting real estate or property of such railroad company or companies, may be sold by the marshal of said city at public outcry to the highest bidder, and such sale shall vest absolute title to such property in the purchaser; * * *. The lien for the assessment on abutting property and on street railroad or other railroad companies for making street improvements as heretofore provided shall have rank and priority of payment next in point of dignity to liens for taxes."

The said Acts as construed and enforced against appellants, are attacked as unconstitutional and violative of the

equal protection of law clause and the due process of law provision of the 14th Amendment to the Constitution of the United States.

The Constitution of the State of Georgia, Article VII, Section 2, Paragraph One (Ga. Code Section 6553) provides that:

> "All taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed, * * * and shall be levied under general laws."

The special assessment involved in the case at bar does not fall under this classification.

In *Georgia Railroad and Banking Co. v. Town of Decatur*, 137 Ga. 537, 540, the Supreme Court of the State of Georgia held:

> "Though assessments for local improvements are not taxes within the meaning of the requirement of the constitution that taxes must be ad valorem and uniform, nevertheless assessments for local improvements, such as street paving and sewerage, are an exercise of the taxing power."

For similar decisions, see:

City of Brunswick v. Gordon Realty Co., 163 Ga. 536, 641, 642.

United Railways & Elec. Co. v. Mayor of Baltimore, 127 Md. 660; 96 Atl. 880.

Assessments for local improvements in Georgia are and can be sustained only when the benefits equal the assessment. The benefits must represent the enhancement in value of the property, produced by the construction of the improvement. Such improvements must result in some special advantage to the owners in which the general public does not participate and can not be levied for any amount in excess of the benefits received by the owner from the improvement.

Hayden v. City of Atlanta, 70 Ga. 817, 823;

Brumby v. Harris, 107 Ga. 257, 258–259;

Mayor & Aldermen of Savannah v. Knight, 172 Ga. 371, 374–375;

Holt v. City of LaGrange, 175 Ga. 402, 404.

(A).

While the decision in the case at bar recognizes and states the necessity of benefits in order to sustain improvement assessments, the statutes in question are so construed and enforced against appellants as to deny them the equal protection of law and the due process of law accorded to all other property owners.

In Georgia, as against all property owners other than street railway companies and appellants special assessments are and must be imposed on the real property benefited, and executions issued therefor do not run generally against the other property of the owner not situated upon nor specially benefited by the improvement.

Hayden v. City of Atlanta, 70 Ga. 817, 823;

Brumby v. Harris, 107 Ga. 257, 258–259.

The great weight of authority holds that statutes which attempt to impose personal liability for special assessments are unconstitutional and violative of the due process of law clause of the Constitution of the United States.

Asbary v. Roanoke, 91 Va. 562; 42 L. R. A. 636;

Virginia v. Hall, 96 Ill. 278;

Hoover v. People, 171 Ill. 182; 49 N. E. 367;

Gage v. Chicago, 225 Ill. 218; 80 N. E. 127;

City of Brookline v. Natwick, 22 S. D. 322, 117 N. W. 376;

Meyer v. Covington, 103 Ky. 546; 45 S. W. 769;

Woodward v. Collett, 20 Ky. L. Rep. 1006; 48 S. W. 164;

Barber v. Southern Constr. Co., 20 Ky. L. Rep. 796; 47 S. W. 608;

Neenan v. Smith, 50 Mo. 525, overruling the former Missouri case of St. Louis v. Grubbs, 80 Mo. App. 433.

Heman Constr. Co. v. Levy, 179 Mo. 455, 78 S. W. 613;

Taylor v. Palmer, 31 Cal. 241;

Page v. W. W. Case Company, 145 Cal. 578; 79 Pac. 278;

Holley v. Peace, 110 N. C. 32; 17 L. R. A. 330;

Elliott on Roads & Streets, 3rd Ed. Vol. 2, Sec. 707.

44 Corpus Juris, "Municipal Corporations" Page 877, Section 3586 and cases collected and cited in Note 81.

The legislative acts in question are construed as not creating any personal liability against property owners other than street railway owners. However, as against appellants and street railway companies it is held that the Acts not only created a personal liability against appellants but also a blanket lien against all of their property, real and personal, wherever located, without regard to whether such property was or was not benefited.

In thus treating appellants differently from all other property owners the Acts in question are so construed as to deny them the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States. It is no reply to such discrimination to say that some of the property of railway companies can not be levied upon and sold without special legislative authority. The Legislature can create the same kind of lien upon railway property, specially benefited, and authorize the issuance and enforce-

ment of executions against such property in the same or like manner as is done with reference to property of others specially benefited.

In other and more serious respects the Acts in question, as construed and enforced against appellants, deny them the due process of law and the equal protection of law accorded other property owners.

This court has repeatedly held that an improvement assessment which substantially exceeds the benefits conferred is not taxation but unconstitutional confiscation.

Norwood v. Baker, 172 U. S. 269;

Standard Pipe Line Co. v. Miller Co. Hwy Bridge Dist., 277 U. S. 160,162.

Road Improvement Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

Street railway companies are entitled to the same constitutional protection accorded to others.

44 Corpus Juris, "Municipal Corporations" page 534, Section 2896.

Road Imp. Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

City of Commerce v. Southern Ry. Co., 35 Fed (2d) 331.

Road Improvement Dist. No. 1 of Franklin Co. Ark. v. Missouri Pac. R. Co., 2 Fed. (2d) 340; 341.

City of Barree v. Barree Chelsa R. R. Co., 123 Atl. 427.

United Railway & Elec. Co. v. Mayor of Baltimore, 127 Md. 660.

In the case at bar appellants, by demurrer (Record, Pages 38-41) and by their answer (Record, Pages 20-34), pleaded the lack of benefits from the improvement in question.

Appellants offered to establish such facts by both docu-

mentary and oral testimony. (Record, Pages 99-107). The trial court and the Supreme Court of the State of Georgia construed and enforced the statutes in question so as to deny appellants the right to introduce evidence which would have established an absence of benefits from the improvement. (Record, Pages 146-147). The assessment in question vastly exceeded all benefits (if any) which appellants or appellants' property could receive from the improvement in question, therefore the enforcement of such improvement assessment unconstitutionally confiscated appellants' property.

Standard Pipe Line Co. v. Wilkes County Highway Bridge Dist., 277 U. S. 160; 162.

Road Improvement Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

Norwood v. Baker, 172 U. S. 269.

Carolina & N. W. R. Co. v. Town of Clover, 46 Fed. (2d) 395.

City of San Diego v. Atkinson, Topeka & Santa Fe Ry. Co., 45 Fed. (2d) 11.

City of Commerce v. Southern Ry. Co., 35 Fed. (2d) 331.

Road Improvement Dist. No. 1 v. Missouri Pac. R. Co., 2 Fed. (2d) 340.

Since appellants were denied the right to introduce any evidence or testimony to establish a lack of benefits, they were denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Saunders v. Shaw, 244 U. S. 317;

Sneider v. Massachusetts, 291 U. S. 128;

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 19.

Not only were appellants denied due process of law in the case at bar but they were also denied the equal protection of the law.

As against all other property owners improvement assessments under the statutes in question are based solely upon real estate. (See cases on Page 23 of this brief.) As against street railway companies (appellants) the improvement assessments are based upon personal property as well as real property.

The Supreme Court of the State of Georgia in its opinion held that appellants were operating in the City of Decatur an electric light and power business, and that "the city authorities in causing the paving and making the assessment may very well have considered in determining the benefit to be derived therefrom the value of the whole property and not merely one branch of the service."

(Printed record, page 144.)

The statutes in question are construed as basing an improvement assessment against street railway companies upon personal as well as real property, whereas against all other parties such assessments are confined to real property alone.

In *Road Improvement District No. 1 v. Missouri Pac. Ry. Co.*, 274 U. S. 188, 192, 194, this court held that such distinction in computing and enforcing an assessment constitutes an unreasonable discrimination. On Page 194, this court held:

> "Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the 14th Amendment and that it is otherwise so excessive as to be a manifestly arbitrary exaction and in violation of the due process of law clause of the same amendment."

Another and an additional unreasonable and unconstitutional discrimination arises from the different effect which the legislative presumption of benefits is given as applied to other owners of property, and as applied to appellants.

As against all other property owners except appellants it is held that the legislative presumption of benefits is rebutted and a prima facie case of confiscation is established by showing that the entire value of the property specially benefited will be required to pay the assessment.

Holst v. City of LaGrange, 175 Ga. 402, 404.

A tender of such property is evidentiary, if not conclusive evidence, of an absence of benefits.

In appellants' answer they offered and tendered to the City of Decatur all of the street railway property and street railway lines owned and operated within the territorial limits of the City of Decatur, together with the franchises under which they were constructed and operated. (See Pages 23 and 24 of the printed record.) See also opinion of the Supreme Court of the State of Georgia on Page 136 of printed record.

The court did not permit appellants to introduce evidence to sustain its contentions in this respect. (See printed Record, Pages 99–107.)

The Supreme Court held that the admission of such evidence was immaterial to a consideration of the case. (See printed Record, Pages 146, 147.) In the body of the court's opinion, the court held: "To rebut this presumption the defendant offered to surrender and tender to the city their street railway franchises and property." (See Page 143 of the printed Record.) The Supreme Court then held that the tender did not go far enough, but that for appellants to rebut the legislative presumption of benefits, they would have to tender all of their property, both real and personal, including electric light and power property and business, as well as street railway franchises and property.

As Against Appellants, the Legislative Presumption of Benefits was held to be Conclusive and Prevented Appellants From Introducing Evidence and Testimony Showing a Lack of Benefits. The Supreme Court of Georgia held:

> "The power of determining the benefits to be received by the property of the street railway company from local improvements is a legislative one; and in this case, by virtue of the charter of the City of Decatur, that authority was vested solely in the commissioners of said city, who in the exercise of said authority, have determined the same."
>
> (See Page 139 of the printed record.)

The action of a municipality is not conclusive on the question of benefits; they must be determined upon evidence and not solely by virtue of legislative enactments or municipal ordinances.

Norwood v. Baker, 172 U. S. 269;

Standard Pipe Line Co. v. Miller County Hwy. Bridge Dist., 277 U. S. 160, 162.

Road Improvement Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

Road Improvement Dist. No. 1 of Franklin County, Ark. v. Missouri Pac. R. Co., 2 Fed (2d) 340.

City of Commerce v. Southern Ry. Co., 35 Fed (2d) 331.

C. & N. W. Ry. Co. v. Town of Clover, S. C., 46 Fed (2d) 395.

Immediately following the above quotation from the opinion of the Supreme Court of the State of Georgia, the Court said:

> "The question of benefits * * * will not be inquired into by the courts unless it is made to appear that there has been an arbitrary abuse of such authority."
>
> (Printed record, page 139.)

Under the authorities just heretofore cited, unconstitutional confiscation is shown by evidence that the improvement assessment exceeds the benefits, and it is not necessary to prove "arbitrary abuse of authority."

In the case at bar the improvement statutes in question were so construed as to deprive appellants of the right to establish by evidence an entire absence of benefits.

(See printed record, pages 99–107.)

In *Bandini v. Superior Court*, 284 U. S. 8, 19, this court held that the legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. (See cases there cited.)

The refusal to allow appellants to introduce any evidence whatever to establish an entire absence of benefits renders the so called legislative presumption of benefits an absolute and conclusive one.

We respectfully submit that it is idle to designate a presumption as one which can be rebutted and then deny a party the right to disprove such presumption by evidence.

2. Constitutionality of Assessment Statutes Not Decided in Previous Cases.

The fifth assignment of error, to which attention is now directed, is heretofore set out on page 13 of this brief. (See also Page 155 of the printed record.)

In the decision of the Supreme Court of the State of Georgia, the court held that the question of no benefit, that the paving assessment was confiscatory, and other questions as to the legality of the assessment had been raised and decided in previous Georgia decisions, affirmed on review by this court.

(See Pages 144 and 145 of the printed record.)

Such holding was erroneous for in no previous decision had the Supreme court of the State of Georgia or this Court

rendered any binding decision with reference to the constitutionality of the improvement statutes or of the improvement assessment in question.

In the case of *Georgia Rwy. & Power Co. v. Town of Decatur*, 152 Ga. 143; 153 Ga. 329; 262 U. S. 432, the only question involved was the validity of a certain municipal rate franchise or contract. The question of the constitutionality of the improvement assessment statutes and the improvement assessment in question was neither raised nor decided. In fact, those cases arose prior to the enactment of the said improvement assessment statutes.

The case of *Georgia Power Co. v. City of Decatur*, 168 Ga. 705; 281 U. S. 505, did not raise the question of the constitutionality of the improvement assessment statutes or the improvement assessment in question. The only question raised and passed upon in that case was whether a certain municipal rate franchise or contract had terminated at the time of the expiration of the charter of the company to which the franchise was originally granted and whether such franchise or contract was still in force.

The decision of the Supreme Court of the State of Georgia in the case of *Georgia Power Company v. Decatur*, 170 Ga. 699, was in favor of appellants. In the opinions written in said case the Judges expressed divergent views with reference to the improvement assessment statutes, but such divergent views (as held by the Supreme Court of the State of Georgia in *Georgia Power Co. v. Decatur*, 173 Ga. 219) were not the judgment of the court; the only judgment of the court being one in favor of appellants.

The decision of the Supreme Court of the State of Georgia in the case of *Georgia Power Company v. City of Decatur*, 173 Ga. 219, was in favor of appellants.

In no previous decision (other than the one rendered in the instant case and now sought to be reviewed) has the Supreme Court of the State of Georgia rendered any final

or binding decision with reference to the constitutionality of the improvement statutes or the improvement assessment in question.

Under the statutes, rules and decisions of this court, the decision of the Supreme Court of the State of Georgia, now brought to this Court for review, is the only final decision involving the constitutionality of the improvement assessment statutes and the improvement assessment in question which could have been brought to this Court for review.

(See, *Georgia Railway & Power Co. v. Decatur*, 262 U. S. 432; Pages 436-437.)

3. State Court Erred in Holding That Appellants Had Failed to Overcome Presumption of Benefits in View of Court's Ruling That Exclusion of Appellant's Evidence on That Question was Proper.

The sixth assignment of error, now to be discussed, is set out on Page 14 of this brief, and also on Page 156 of the printed record.

It was error for the Supreme Court of the State of Georgia to hold that appellants did not show that the street railway franchise and property thereunder was the whole franchise and property held and operated by appellants in connection with their street railway and power business in the city; that they failed to show that they were not also operating in connection with the street railway business an electric light and power business in the city, and, hence; the evidence of appellants was insufficient to overcome the legal presumption in favor of the assessment.

(Pages 143–144 of the printed record.)

In the petition brought by Appellee against Appellants, the City of Decatur did not allege nor contend that the

power business and property of appellants was owned and operated in connection with their street railway property and business.

The street railway property and franchises and the electric light and power property and business were first constructed, owned and operated by entirely separate and distinct companies. The different franchises were acquired by separate and distinct companies. The two distinct classes of business (street railway business and the electric light and power business) have been operated separately and distinctly, one from the other. In the trial court, appellants offered evidence to show the above facts and also offered in evidence the municipal franchise under and by virtue of which the street railway lines and property in Decatur were constructed and being operated.

(See printed record, pages 85–93.)

Upon the objection of appellee the trial court denied appellants the right to introduce such evidence, holding that the same was irrelevant and immaterial.

(See printed record, pages 85 and 93.)

The Supreme Court of the State of Georgia affirmed this ruling of the trial court.

(See pages 146 and 147 of the printed record.)

It is respectfully submitted that it was error for the Supreme Court of Georgia to uphold the exclusion of such evidence as being irrelevant, and then hold that appellants *had failed* to overcome the legal presumption in favor of the assessment by omitting to introduce the very evidence which they (the appellants) had sought to introduce and which had been thus excluded.

The fact that separate and distinct companies, owning separate and distinct property and franchises, were merged or consolidated into another company did not convert

separate and distinct municipal franchises and separate and distinct businesses and classifications of business into one franchise and one business.

Blair v. Chicago, 201 U. S. 400;

Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116;

Detroit U. R. Co. v. Detroit, 229 U. S. 39.

(See also what is said hereafter on this question in discussing the eighth and ninth assignments of error.)

4. Exclusion of Appellants' Evidence Showing Absence of Benefits Constituted Denial of Due Process of Law.

The seventh assignment of error is set out on Page 15 of this brief. See also Pages 156–157 of the printed record.

The trial court excluded all of the evidence offered and tendered by appellants. The excluded evidence would have established: (a) That the street railway franchise and property was separate and distinct from the electric light and power business. (See Pages 85–93 of printed record.) (b) That appellants and appellants' property received no benefit from the improvement for which the assessment in question was made.

(Printed record, pages 105–107.)

This denial to appellants of their right to introduce evidence establishing their defense denied appellants the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Saunders v. Shaw, 244 U. S. 317;

Sneider v. Massachusetts, 291 U. S. 97, 128;

Bandini Petroleum Co., v. Superior Court, 284 U. S. 8, 19.

5. State Court's Holding That Merger of Companies Resulted in Merger of Franchises Erroneous and also Inconsistent with Other Holdings.

The eighth and ninth assignments of error are set out on Page 15 and Page 16 of this Brief. See also Pages 157–159 of printed transcript of record.

As pointed out under the sixth assignment of error, the consolidation or merger of various companies into another company, does not cause all franchises originally granted separate companies to be "consolidated and merged into one franchise." The consolidation of various companies into another company does not and can not change or alter the various separate and distinct municipal franchises. If the consolidation or merger of various companies into another Company merges all of the separate and distinct franchises "into one franchise," into which one or particular franchise are they merged? The various municipal franchises may have been granted for different periods of time and upon entirely different and distinct terms and conditions.

The municipal rate ordinance of the City of Decatur was held by this Court (Georgia Power Co. v. City of Decatur, 262 U. S. 432, 439), to be a separate classification from other municipal franchises (the others being under the jurisdiction of the Georgia Public Service Commission). If the consolidation and merger of companies merges all franchises "into one franchise," under which classification does the one franchise thereafter exist? If they are all merged into one, a separate classification can no longer exist as to one of them.

It was error for the Supreme Court of the State of Georgia to hold that the consolidation of various separate companies into one company merged *all* franchises *into one franchise*, and then hold that the municipal five-cent rate of fare franchise continued in force as a separate and distinct franchise and as a separate classification from all other franchises. It

is respectfully submitted that such holdings are contradictory and one of them is erroneous.

6. Improvement Assessment Invalid as Blanket Lien on Appellants' Property "Wherever Located."

In addition to holding that all of the franchises of the company had been consolidated into one franchise, the court held that the improvement assessment in question was a blanket lien against appellants and their property "wherever located," whether within or beyond the municipal limits of Decatur, from the time of the ordinance making the assessment.

(See Pages 125–126 of printed record.)

Such construction of the said improvement statutes gave the municipality the right to impose an improvement assessment upon property located beyond and outside of its territorial jurisdiction, in fact, upon property located anywhere within the State of Georgia.

A tax levied upon an entire property, part of which is without the jurisdiction of the taxing body, is invalid.

Cooley, "Taxation" 4th Edition, Vol. 1, Section 97.

7. Statutes and Assessment In Question Not Within Classification of "General Taxation."

The special improvement assessment statutes and the special improvement assessment in question do not fall under the classification of general taxation or the creation of local improvement districts levying general taxes for public pur-

poses. With reference to such taxation the Constitution of the State of Georgia Article, 7, Section 2, Paragraph 1 (Georgia Code Section 6553) provides:

> "All taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The assessment in question was not made or levied in conformity with such constitutional provision. Hence it was not a general tax, but a special improvement assessment the legality of which must depend upon special benefits to the property assessed.

The principles applied in Norwood v. Baker, 172 U. S. 269, and similar cases, are applicable to the present improvement statutes and the special improvement assessment in question.

* * * *

In Georgia, in equitable as well as legal actions, it is error to direct a verdict where there is any conflict in the evidence. In such cases the issues must be submitted to a jury for their determination.

Colson v. Meyers, 80 Ga. 499 (1);

Webb v. Thompson, 146 Ga. 461;

Fountain v. Hagan Gas Engine & Mfg. Co., 140 Ga. 70 (2);

Bonds v. Brown, 133 Ga. 451 (2).

In the case at bar all of appellants' evidence establishing a lack of benefits from the improvement in question was excluded. A verdict against appellants was directed. Thus appellants were denied the right to establish by evidence

issues raised by their pleadings and have the same passed upon by a jury. This was a denial to appellants of the equal protection of law and the due process of law accorded all other property owners.

Respectfully submitted,

WALTER T. COLQUITT,
COLQUITT, PARKER, TROUTMAN & ARKWRIGHT,
Attorneys for Appellants.